

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ERNEST SIMMONS, ROBIN SIMMONS,  
KORY SIMMONS, individually and as  
general partners of SIMMONS & SON  
HAULING, a Washington general  
Partnership, S.I. LLC, a  
Washington limited liability  
company, and N.V.L.R. & M. LLC, an  
Oregon limited liability company,  
qualified to do business in the  
State of Washington,

Plaintiffs,

v.

WASHINGTON STATE DEPARTMENT OF  
NATURAL RESOURCES, DAVE NORMAN,  
JOHN BROMLEY, ELAINE POWELL, CHRIS  
JOHNSON, and DAVID WILLIAMSON,  
d/b/a HORSESHOE BEND QUARRY, INC.,

Defendants.

NO. CV-12-3046-EFS

**ORDER DENYING PLAINTIFFS'  
MOTION FOR A PRELIMINARY  
INJUNCTION**

Before the Court, without oral argument, is Plaintiffs Ernest Simmons, Robins Simmons, Kory Simmons, Simmons & Son Hauling, S.I. LLC ("Simmons"), and N.V.L.R. & M. LLC's (collectively, "Plaintiffs") Motion for Preliminary Injunction. ECF No. 9. Defendants Washington State Department of Natural Resources (DNR), Dave Norman, John Bromley, Elaine Powell, Chris Johnson, and David Williamson oppose the motion, raising jurisdiction and merits-based arguments in opposition. After reviewing the parties' filings and applicable authority, the Court is fully

1 informed. For the reasons set forth below, the Court denies Plaintiffs'  
2 motion: DNR and its officials are not barred from enforcing the DNR  
3 Emergency Order at this time. Further, the parties are to file briefing  
4 addressing whether this lawsuit should be dismissed due to Eleventh  
5 Amendment immunity.

6 **A. Background**

7 **1. Documents Considered**

8 When considering a preliminary-injunction motion, a district court  
9 is to determine the facts based on the submitted evidence, rather than  
10 merely rely on the pleadings. See Fed. R. Civ. P. 65(a)(2) ("evidence  
11 that is received on the motion") & (b)(1)(a) ("specific facts in an  
12 affidavit or a verified complaint"). Here, the only evidence presented  
13 by Plaintiffs were two photographs attached to the reply. ECF No. 36 Ex.  
14 A. However, these photographs were not accompanied by a declaration  
15 identifying them as purporting to be photographs of the Nile Landslide  
16 area on the identified dates. See Fed. R. Evid. 901(a) ("To satisfy the  
17 requirement of authenticating or identifying an item of evidence, the  
18 proponent must produce evidence sufficient to support a finding that the  
19 item is what the proponent claims it is.").

20 Authenticated facts were presented by Defendants through the  
21 declarations of Defendant John Brumley, ECF Nos. 34 & 35, and Thomas  
22 Badger, ECF No. 32. Plaintiffs ask the Court to strike these  
23 declarations because they include unsupported, false, and misleading  
24 information. Plaintiffs, however, did not support their strike request  
25 with declarations identifying the deficiencies in Defendants'  
26 declarations. Given Defendant Brumley and Mr. Badger's education and

1 work experience, the Court denies Plaintiffs' request to strike the filed  
2 declarations.

3 Notwithstanding Plaintiffs' failure to present authenticated  
4 evidence, the Court considers the factual assertions in the pleadings and  
5 memoranda that appear to be undisputed when preparing this factual  
6 statement.

## 7 **2. Factual Statement**

8 In 1994, Ernest, Robins, and Kory Simmons began operating Simmons,  
9 a surface mining operation in the Naches, Washington area after obtaining  
10 a surface mining permit and an approved reclamation plan from DNR. ECF  
11 No. [35](#) Ex. 2 at 28-45. Simmons mined talus and other material pursuant  
12 to this 1994 permit and plan.

13 In 2005, DNR issued Simmons an Order to Rectify Deficiencies ("2005  
14 DNR Order") under RCW 78.44.190, finding that Simmons had disturbed three  
15 acres outside of the permitted area, permit boundaries were not  
16 adequately marked, the reclamation plan was more than ten years old, and  
17 there were observed tension and landslide scarps. ECF No. 34 Ex. [1](#). The  
18 2005 DNR Order required Simmons to submit a modified and expanded surface  
19 mine reclamation plan and permit application. Simmons did not appeal the  
20 Order, and made several attempts between 2005 and 2008 to submit an  
21 application. These applications were either incomplete or inadequate;  
22 DNR therefore never approved a new permit or reclamation plan for  
23 Simmons. DNR, however, did not require Simmons to cease mining under the  
24 1994 permit and plan.

25 On October 11, 2009, a landslide (the "Niles Landslide"), which may  
26 have originated from State land adjacent to Simmons, buried approximately

1 forty acres of the Simmons' mine, as well as buried a state highway with  
2 about 100 feet of dirt and rock, damaged several residential homes, and  
3 rerouted the Naches River, in total affecting approximately 110 acres.  
4 After the Niles Landslide, the Washington Department of Transportation  
5 (DOT) approached Simmons about providing material to use in the  
6 reconstruction of the highway.<sup>1</sup> Simmons began doing some mining  
7 activity.

8 DNR learned of the mining, visited Simmons, determined that surface  
9 mining was not appropriate under the 1994 permit and plan given the  
10 change in topography and landscape, and on November 4, 2009, issued an  
11 Emergency Order to Suspend Surface Mining ("DNR Emergency Order") to  
12 Simmons. In December 2009, Simmons administratively appealed the DNR  
13 Emergency Order; this appeal was referred to the Washington State Office  
14 of Administrative Hearings. Summary judgment motions were filed, and a  
15 hearing was set for July 20, 2010. Days before the summary-judgment  
16 hearing, the parties entered into an interim settlement agreement,  
17 staying the administrative appeal. Under the settlement agreement,  
18 Simmons was to complete a subsurface study of the mine site. Simmons has  
19 not yet conducted a subsurface study, and so on February 23, 2012, DNR  
20

---

21 <sup>1</sup> In time, DOT rerouted traffic and relocated the highway around  
22 the toe of the landslide, using materials obtained from a Simmons'  
23 competitor. Before and during the highway relocation phase, DOT  
24 installed thirty-four geotechnical borings to assess the impact of the  
25 highway reconstruction on slope stability. The bores were not used to  
26 evaluate the impact of resumed mining at Simmons.

1 asked the administrative hearing board to dismiss the appeal because  
2 Simmons has not complied with the settlement agreement.

3 On April 9, 2012, Plaintiffs filed the instant Complaint, which  
4 asserts the following thirteen causes of action: 1) a 42 U.S.C. § 1983  
5 claim that Defendants issued the DNR Emergency Order without the  
6 authority to do so, 2) a § 1983 claim for violation of the Fifth and  
7 Fourteenth Amendments because Defendants took Plaintiffs' property  
8 without due process of law, 3) a § 1983 claim for depriving Plaintiffs  
9 of their ability to mine and make a profit without due process of law,  
10 4) a violation of Washington Constitution Article 1, § 16 by inversely  
11 condemning Plaintiffs' property because the State's land buried  
12 Plaintiffs' property, 5) a violation of Washington Constitution Article  
13 1, § 16 by inversely condemning Plaintiffs' property through a regulatory  
14 taking, 6) a § 1983 claim based on a violation of the Fifth and  
15 Fourteenth Amendments because the State's land buried Plaintiffs'  
16 property, depriving Plaintiffs of its economically viable use without  
17 just compensation, 7) a violation of 15 U.S.C. § 1 by conspiring to  
18 prohibit Plaintiffs to mine, 8) violation of 15 U.S.C. § 14 by agreeing  
19 not to use Plaintiffs' product, 9) conspiracy to restrain trade in  
20 violation of RCW 19.86.030, 10) an agreement not to use Plaintiffs'  
21 product in violation of RCW 19.86.030, 11) seeking under RCW 7.16.040 a  
22 writ of certiorari that the DNR Emergency Order is void, 12) seeking  
23 under RCW 7.16.300 a writ of prohibition to prevent DNR from enforcing  
24 the DNR Emergency Order, and 13) seeking under RCW 7.16.300 a writ of  
25 prohibition to prevent DNR from enforcing the settlement agreement. On  
26 May 4, 2012, the State Defendants answered. ECF No. [10](#).

1 Now before the Court is the Plaintiffs' Motion for Preliminary  
2 Injunction. ECF No. [9](#).

3 **B. Authority and Analysis**

4 Plaintiffs seek a preliminary injunction barring DNR and the named  
5 employees from enforcing the DNR Emergency Order because the Washington  
6 Surface Mining Act, RCW 78.44 *et seq.*, does not provide DNR with the  
7 authority to issue a cease-mining order based on changed topography due  
8 to a natural occurrence, and Defendants continued steps to enforce the  
9 DNR Emergency Order is putting Simmons at risk of ceasing operations.  
10 Defendants present a two-pronged challenge to Plaintiffs' preliminary-  
11 injunction motion: 1) jurisdictional arguments, and 2) merits-based  
12 arguments. Defendants contend this Court lacks the jurisdiction to hear  
13 Plaintiffs' injunction request because 1) the Eleventh Amendment bars  
14 this federal lawsuit against the state of Washington, 2) the Court should  
15 abstain from exercising jurisdiction consistent with the *Younger*  
16 doctrine, and 3) Plaintiffs' Fifth Amendment claim is not yet ripe. The  
17 Court begins its analysis with the jurisdiction-based arguments.

18 **1. Eleventh Amendment**

19 The Eleventh Amendment generally prohibits a federal lawsuit from  
20 being brought against a State. U.S. Const. Amdt. XI ("The Judicial power  
21 of the United States shall not be construed to extend to any suit in law  
22 or equity, commenced or prosecuted against one of the United States by  
23 Citizens of another State, or by Citizens or Subjects of any Foreign  
24 State."); see *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-69  
25 (1997) (recognizing that a State's protection from suit extends to  
26 lawsuits brought by a citizen of that State). There are three exceptions

1 to the Eleventh Amendment immunity bar: 1) where the State has consented  
2 to suit in federal court, 2) where applying *Ex Parte Young*, 209 U.S. 123  
3 (1908), and its progeny is appropriate, and 3) where Congress has  
4 abrogated the State's immunity. *Nelson v. Miller*, 170 F.3d 641, 646 (6th  
5 Cir. 1999). The only exception at issue here is whether *Ex Parte Young*  
6 applies.

7 Under the *Ex Parte Young* exception, a plaintiff may bring a lawsuit  
8 for prospective relief against a state official in his official capacity  
9 to correct an ongoing violation of the U.S. Constitution or federal law.  
10 209 U.S. at 159-60. Therefore, to determine whether applying the *Ex*  
11 *Parte Young* exception is appropriate, the Court must assess whether  
12 Plaintiffs are seeking 1) prospective relief 2) against a state official  
13 in his official capacity 3) that seeks to correct an ongoing U.S.  
14 Constitution or federal law violation.

15 Plaintiffs contend that at this time they are only seeking  
16 prospective relief: an order that DNR and its officials may not enforce  
17 the DNR Emergency Order. However, when considering whether this Court  
18 has jurisdiction over a lawsuit, the Court must consider not only the  
19 relief requested by Plaintiffs through their preliminary-injunction  
20 motion but also what relief they seek in their Complaint. *See Pennhurst*  
21 *State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) ("A federal  
22 court must examine each claim in a case to see if the court's  
23 jurisdiction over that claim is barred by the Eleventh Amendment."). In  
24 their Complaint, Plaintiffs seek not only prospective relief but also  
25 compensatory damages for the alleged taking of their property. The State  
26 of Washington "is the real, substantial party in interest." *Ford Motor*

1 *Co. v. Dep't of Treas.*, 323 U.S. 459, 464 (1945); see *Ass'n of N.W.*  
2 *Steelheaders v. U.S. Army Corps of Eng'rs*, 485 F.2d 67 69 (9th Cir. 1973)  
3 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963) ("The general rule is  
4 that a suit is against the sovereign if 'the judgment sought would expend  
5 itself on the public treasury or domain, or interfere with the public  
6 administration,' or if the effect of the judgment would be 'to restrain  
7 the Government from acting, or to compel it to act.'" (internal citation  
8 omitted)). Accordingly, application of the *Ex Parte Young* exception to  
9 the Eleventh Amendment immunity bar is not appropriate here.

10 Further, as the Complaint is styled, it appears Plaintiffs' request  
11 for prospective relief is based on a violation of state law rather than  
12 an ongoing U.S. Constitution or federal law violation. No federal law  
13 is alleged to be violated. Rather Plaintiffs bring this lawsuit under  
14 § 1983, which is the legal vehicle used to assert a violation of a  
15 federal constitutional right. See *Henderson v. City of Simi Valley*, 305  
16 F.3d 1052, 1056 (9th Cir. 2002) ("Section 1983 does not create any  
17 substantive rights; rather it is the vehicle whereby plaintiffs can  
18 challenge actions by governmental officials."). Plaintiffs allege that  
19 their Fifth and Fourteenth Amendment rights were infringed because their  
20 property, the Simmons' mine and money derived therefrom, has been taken  
21 through Defendants' enforcement of the invalid DNR Emergency Order.  
22 Plaintiffs do not allege that this DNR Emergency Order fails to comply  
23 with a federal statute or constitutional principle but rather that DNR  
24 did not have the authority to issue it under Washington's Surface Mining  
25 Act. Whether DNR has the authority to issue the DNR Emergency Order  
26 under Washington law is a question for the Washington courts to decide.

1 For the above-given reasons, it is not appropriate here to apply the  
2 *Ex Parte Young* exception. Accordingly, the Court denies Plaintiffs'  
3 Motion for Preliminary Injunction because the Court lacks the  
4 jurisdiction to hear it. Consistent with this ruling, the Court  
5 understands it does not have jurisdiction to hear this lawsuit. The  
6 Court grants the parties leave to file briefing, limited to five pages,  
7 identifying whether dismissal of the lawsuit is required.

8 For completeness of the record, the Court briefly addresses the  
9 other arguments raised by the parties.

## 10 **2. Younger Abstention Doctrine**

11 In *Younger v. Harris*, the Supreme Court held that federal courts are  
12 not to interfere with ongoing state proceedings in order to ensure equity  
13 and comity between the federal and state courts and to avoid duplication.  
14 401 U.S. 37 (1971). Although *Younger* arose in the criminal context, case  
15 law has extended it to the civil context as well. *Middlesex Cnty. Ethics*  
16 *Comm. v. Garden St. Bar Ass'n*, 457 U.S. 423, 437 (1982). Accordingly,  
17 if a state administrative or judicial proceeding is pending in which  
18 important state interests are implicated and it provides the plaintiff  
19 with an adequate opportunity to raise federal constitutional issues, the  
20 federal court should abstain from hearing the federal constitutional  
21 issues that could be raised in the state proceeding. *Id.* at 436;  
22 *Agriesti v. MGM Grand Hotels, Inc.*, 53 F.3d 1000, 1001 (9th Cir. 1995).

23 Here, Plaintiffs initiated a state administrative proceeding by  
24 appealing the DNR Emergency Order. Although that proceeding was stayed  
25 pending the settlement agreement, it was reopened this winter when DNR  
26 asked the administrative hearing board to dismiss the appeal given

1 Plaintiffs' purported failure to abide by the settlement agreement. This  
2 state administrative proceeding is in essence a state enforcement  
3 proceeding of the DNR Emergency Order. Accordingly, this administrative  
4 proceeding is not, as Plaintiffs suggest, reviewing legislative or  
5 executive action. Instead it is an action that "command[s] the respect  
6 due court proceedings." *Ohio v. Civil Rights Comm'n v. Dayton Christian*  
7 *Schs., Inc.*, 477 U.S. 619, 627 (1986) (quoting *Gibson v. Berryhill*, 411  
8 U.S. 564, 576-66 (1973)).

9 Further, the administrative proceeding, and any subsequent state  
10 court proceeding arising from an appeal, provide Plaintiffs with an  
11 adequate opportunity to raise federal constitutional issues. See *Ohio*  
12 *Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986)  
13 (finding it sufficient under *Middlesex* "that constitutional claims may  
14 be raised in state-court judicial review of the administrative  
15 proceeding").

16 Therefore, the Court determines that abstaining under *Younger* is  
17 appropriate at this time. Typically, a federal civil lawsuit requesting  
18 damages and involving *Younger* abstention issues is stayed pending the  
19 state administrative and judicial proceedings. *Gilbertson v. Albright*,  
20 381 F.3d 965, 981-82. Because this lawsuit may be dismissed entirely due  
21 to Eleventh Amendment immunity, the parties are also given leave to  
22 address whether this lawsuit should be dismissed or stayed in their to-  
23 be-filed briefs.

### 24 **3. Ripeness**

25 Defendants argue that Plaintiffs' regulatory takings and § 1983  
26 claims are not ripe because the State has yet to make a final

1 determination regarding what mining may occur at Simmons. Plaintiffs  
2 maintain that their request for a preliminary injunction is ripe because  
3 it is based simply on the argument that DNR and the named DNR employees  
4 lack the authority to issue and enforce the DNR Emergency Order.

5 Plaintiffs' damages claims are not ripe given that DNR has not made  
6 a final decision as they are waiting for Plaintiffs to submit a slope  
7 stability analysis. See *Williamson Cnty. Reg'l Planning Comm'n v.*  
8 *Hamilton Bank of Johnson City*, 473 U.S. 172, 190 (1985) ("[A] claim that  
9 the application of government regulations effects a taking of a property  
10 interest is not ripe until the government entity charged with  
11 implementing the regulations has reached a final decision regarding the  
12 application of the regulations to the property at issue."). Nonetheless,  
13 when limiting the Court's ripeness analysis to Plaintiffs' claim that  
14 Defendants lack the authority to issue and enforce the DNR Emergency  
15 Order, the Court finds this claim is ripe. Yet, as indicated above, the  
16 Court cannot hear this preliminary-injunction motion because the Eleventh  
17 Amendment bars jurisdiction and *Younger* absention is appropriate.

#### 18 **4. Merits**

19 A court may only grant preliminary injunctive relief when the  
20 plaintiff can "establish that he is likely to succeed on the merits, that  
21 he is likely to suffer irreparable harm in the absence of preliminary  
22 relief, that the balance of equities tips in his favor, and that an  
23 injunction is in the public interest." *Am. Trucking Ass'ns, Inc. v. City*  
24 *of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v.*  
25 *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). By failing to  
26 submit any authenticated evidence, Plaintiffs failed to establish any of

1 the *Winter* factors. See also *K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087,  
2 1088-89 (9th Cir. 1972) (If the record before a court "consist[s] largely  
3 of general assertions which are substantially controverted by counter-  
4 affidavits, a court should not grant [a preliminary injunction] unless  
5 the moving party makes a further showing sufficient to demonstrate that  
6 he will probably succeed on the merits."). In regard to the likelihood  
7 of success on the merits, the Court finds Plaintiffs are not likely to  
8 prevail on their argument that DNR does not have the authority to issue  
9 and enforce the DNR Emergency Order under RCW 78.44.200 due to changed  
10 topography and landscape resulting from a natural occurrence. Also, the  
11 public interest weighs against the requested preliminary injunction  
12 because the risk of initiating a new landslide and placing the lives of  
13 people, animals, and vegetation in harm's way is too great when balanced  
14 against Plaintiffs' interest to produce a profit without conducting the  
15 requested stability analysis. See *Weinberger v. Romero-Barcelo*, 456 U.S.  
16 305, 213 (1982) ("In exercising their sound discretion, courts of equity  
17 should pay particular regard for the public consequences in employing the  
18 extraordinary remedy of injunction.").

19 **C. Conclusion**

20 In summary, the Court finds the Eleventh Amendment bars this Court  
21 from hearing Plaintiff's Motion for Preliminary Injunction, absention  
22 under *Younger* is appropriate, and Plaintiffs failed to establish that a  
23 preliminary injunction is warranted. Accordingly, **IT IS HEREBY ORDERED:**

24 1. Plaintiffs' Motion for Preliminary Injunction, **ECF No. 9**, is  
25 **DENIED.**

**DATED** this 19th day of June 2012.

ORDER  $\sim 13$